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No. 90-923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BILLY LAMB and CARMON WILLIS,
Petitioners,

v.

PHILIP MORRIS INCORPORATED

and

B.A.T. INDUSTRIES, PLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT PHILIP MORRIS INCORPORATED IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RULE 29.1 STATEMENT

Pursuant to Supreme Court Rule 29.1, respondent states that, pursuant to a corporate reorganization, Philip Morris Companies Inc. has succeeded Philip Morris Incorporated. Philip Morris Companies Inc. has no parent company and no subsidiaries (except for wholly owned subsidiaries).

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COUNTERSTATEMENT OF THE CASE

This is a strike suit. The core of petitioners' case is their claim that respondents made a contribution to a Venezuelan charity. In return, petitioners contend that the charity induced the Venezuelan government to set artificially low prices and tax rates for tobacco grown in Venezuela. These actions by the Venezuelan government

allegedly generated a "flood of undervalued imported tobacco into this country" at prices so low that petitioners, domestic growers of burley tobacco, could not compete. (Pet. at 8.) Petitioners assert that respondents' charitable contributions therefore violated both the federal antitrust laws and the Foreign Corrupt Practices Act of 1977 (the "FCPA").

Petitioners' statement of the case omits two crucial facts. *First*, their claim that there was a "flood" of Venezuelan tobacco into this country is demonstrably false. U.S. government statistics show no flood—indeed, they show barely a trickle—of imported tobacco from Venezuela.[1] Absent this imaginary deluge of cheap foreign tobacco, petitioners' case collapses.

Second, petitioners neglect to mention that the U.S. government previously investigated respondents' charitable contributions and found no basis for a claim under the FCPA. Petitioners refer to a letter from the Department of Justice regarding that investigation (Pet. at 9), but choose not to provide a copy to the Court, for the simple reason that the Department concluded that no further action was warranted since there was no "evidence of a payment to a foreign official."

The foregoing facts demonstrate that the complaint is totally devoid of merit.

SUMMARY OF ARGUMENT

There is no basis for granting certiorari. *First*, there is no conflict among the circuits; indeed, prior to this case there were no courts of appeals decisions regarding the availability of a private right of action under the FCPA. *Second*, review should be denied because the de-

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[1] According to the government statistics, there were *no* imports of burley tobacco (the type grown by petitioners) from Venezuela during the relevant time period, and imports of all types of tobacco leaf from Venezuela accounted for approximately one ten-thousandth (.0001) of the U.S. domestic sales of tobacco in the same period.

cision below is interlocutory, and there are not extraordinary circumstances requiring immediate review. *Finally*, the decision of the court of appeals is clearly correct.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioners' principal basis for requesting review of the Sixth Circuit's decision that there is no private right of action under the FCPA is a series of alleged "conflicts." (Pet. at 16-21.) This claim is baseless.

First, and most importantly, there is no conflict among the circuits. As the court of appeals stated, "the question of whether an implied right of action exists under the FCPA apparently is one of first impression at the federal appellate level." (App. at 14a.) In the absence of a conflict among the circuits, there is no reason for this Court to intervene. *See* Supreme Court Rule 10(a).

Lacking a conflict among the circuits, petitioners contend that the decision of the Sixth Circuit conflicts with a district court case which referred to the legislative history of the FCPA. *Jacobs* v. *Pabst Brewing Co.*, 549 F. Supp. 1050 (D. Del. 1982). (Pet. at 20.) That case, however, involved the existence of a private right of action under the disclosure provisions of the Williams Act, and those are not relevant here. In any event, it is well established that an alleged conflict between a court of appeals decision and a district court decision is not sufficient grounds for granting certiorari. *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.8 at 207 (6th ed. 1986).

Petitioners also assert that the decision of the court of appeals conflicts with three decisions which have allowed defendants to assert the plaintiff's violation of the FCPA as an affirmative defense. (Pet. at 19.) None of these

cases held that the FCPA creates a private cause of action, and accordingly this alleged "conflict" is no conflict at all.[2] Indeed, as petitioners concede, there can be no conflict among the circuits because, "[o]ther than the Sixth Circuit in the case at hand, no court has yet faced squarely the issue of whether private rights of action exist for parties injured by payments proscribed by the FCPA." (Pet. at 19.) There is no conflict.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE JUDGMENT BELOW IS INTERLOCUTORY

Review of the Sixth Circuit's decision is inappropriate because there has been no final judgment in the present case. The court of appeals affirmed the judgment of the district court dismissing the complaint with respect to the FCPA, but remanded the antitrust claims to the district court "for further consideration." (App. at 13a.) Thus, the case below is still at an early stage.[3]

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[2] Petitioners' claim that certiorari should be granted to resolve an alleged conflict between the Department of Justice and the SEC (Pet. at 14-16) is even weaker. Neither agency is involved in this case, and, in any event, this Court has held that the views of the SEC regarding an implied right of action under the securities laws should be accorded little weight. *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n.27 (1977).

[3] Following the decision of the court of appeals, respondent moved to dismiss petitioners' antitrust claims on the following grounds: (1) there is no subject matter jurisdiction under the Foreign Trade Antitrust Improvements Act of 1982 because respondent's charitable contributions did not have a "direct, substantial and reasonably foreseeable effect" on U.S. commerce; (2) petitioners have not suffered any "antitrust injury" under *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 110 S. Ct. 1884 (1990); (3) petitioners lack standing because the nexus, if any, between the conduct of which they complain and the injury they allege is remote, indirect and tangential; (4) the conduct of which petitioners complain is protected under the *Noerr-Pennington* doctrine; and (5) the complaint violates the requirements of Rules 8 and 9 of the Federal Rules of Civil Procedure. Respondent's motion is presently pending before the district court.

It is well established that certiorari to review interlocutory decisions will usually be denied unless exceptional circumstances require immediate review. As the Court stated in *American Construction Co.* v. *Jacksonville, Tampa and Key West Railway Co.*, 148 U.S. 372, 384 (1893), "this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Accord Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostoock Railroad Co.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree"); *Estelle* v. *Gamble*, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting).

No such extraordinary circumstances are present here. If the district court dismisses their antitrust claim, petitioners will have ample opportunity to seek appellate review of all issues. If, on the other hand, respondent's motion to dismiss is denied, the addition of a claim under the FCPA would not entitle petitioners to seek any relief they could not seek under the antitrust laws. Thus, granting reveiw at this early date would only encourage piecemeal litigation and delay a final resolution of this case.

Petitioners' request that this Court issue an advisory opinion regarding the scope of the Foreign Trade Antitrust Improvements Act of 1982 (the "FTAIA") is frivolous. Neither the district court nor the court of appeals has ever addressed respondent's claim that there is no subject matter jurisdiction under the FTAIA, which requires a "direct, substantial and reasonably foreseeable effect" on U.S. commerce as a prerequisite for jurisdiction under the antitrust laws.[4] This Court does not grant

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[4] In view of the almost total lack of any tobacco trade between the U.S. and Venezuela, it is inconceivable that petitioners will be able to make such a showing.

certiorari to review issues that the courts below have not addressed.

III. THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT

Finally, certiorari should be denied because the court of appeals' decision that there is no implied private right of action under the FCPA is clearly correct. No provision in the FCPA purports to create a private right of action; the statute provides only for fines upon conviction for specified activities in a criminal proceeding and for civil enforcement actions by the Attorney General. Moreover, the FCPA has been on the books for over twelve years and no court has ever ruled that the statute creates a private right of action.

The court of appeals in the present case carefully considered each of the four factors delineated in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), in concluding that there is no private cause of action under the FCPA. (App. at 16a-25a.) Specifically, that court found as follows:

(1) Petitioners are not members of a class "for whose *especial* benefit the statute was enacted" because the FCPA was enacted to assist law enforcement officials and "to protect the integrity of American foreign policy and domestic markets," not to protect domestic concerns from foreign competition. (App. at 16a-19a.)

(2) Since the conference report for the final bill does not mention a private right of action, there is no basis for finding that Congress intended to create one. (App. 19a-22a.)

(3) Creating a private right of action would be inconsistent with the legislative scheme because it would interfere with the procedures for administrative enforcement. (App. 22a-23a.)

(4) A private right of action is not necessary since the antitrust laws provide a remedy for foreign conduct that affects U.S. commerce. (App. 23a-25a.)

The only authorities petitioners can summon to support their claim for the extraordinary result they seek are a 1978 opinion issued by the General Counsel of the SEC, a 1979 law review article, and a statement in a House Report that is conspicuously absent from the final report of the Conference Committee. H.R. Conf. Rep. No. 831, 95th Cong., 1st Sess. (1977). (Pet. at 14-17.)

Petitioners' reliance on these few items is patently inadequate to support a ruling that there is an implied private right of action in this sensitive area.

This Court has repeatedly rebuffed attempts to imply novel causes of action under the securities laws. *See Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979). As the court of appeals recognized, the same result is appropriate here.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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